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 GEORGE TYNDALL, M.D.

**UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA**

JANE DOE,

Plaintiff,

v.

UNIVERSITY OF SOUTHERN  
 CALIFORNIA, a California Corporation,  
 BOARD OF TRUSTEES OF THE  
 UNIVERSITY OF SOUTHERN  
 CALIFORNIA, an entity, form unknown;  
 and GEORGE TYNDALL, M.D., an  
 individual, and DOES 1 through 100,  
 inclusive,

Defendants.

No.: 2:18-cv-09530-SVW-GJS

**REPLY MEMORANDUM OF  
 POINTS AND AUTHORITIES IN  
 SUPPORT OF MOTION OF  
 DEFENDANT GEORGE TYNDALL,  
 M.D. TO DISMISS PLAINTIFF'S  
 FIRST AMENDED COMPLAINT**

Date: April 8, 2019  
 Time: 1:30 p.m.  
 Dept.: Courtroom 10A

Action Filed: November 9, 2018  
 Trial Date: None

TO THE ABOVE-ENTITLED COURT AND TO PLAINTIFF, JANE DOE,  
 THROUGH HER ATTORNEYS OF RECORD:

Defendant, George Tyndall, M.D., submits the following Reply Memorandum  
 of Points and Authorities in support of his Motion to Dismiss Plaintiff's First  
 Amended Complaint:

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## TABLE OF CONTENTS

		<u>Page</u>
1		
2		
3	I. PLAINTIFF’S CLAIMS ARE BARRED BY THE APPLICABLE	
4	STATUTES OF LIMITATIONS .....	6
5	A. Plaintiff Was Aware of Her Injuries and Their Cause Twenty-Seven	
6	Years Ago – The Limitations Period Accrued at that Time .....	6
7	B. Plaintiff’s Reliance on the Fraudulent Concealment Theory Is Not	
8	Supported by the Law .....	8
9	II. PLAINTIFF HAS CONCEDED THAT HER THIRD AND FIFTH	
10	CLAIMS MAY BE DISMISSED .....	11
11	III. PLAINTIFF HAS FAILED TO STATE A CLAIM UNDER CAL. CIVIL	
12	CODE § 51– HER SECOND CLAIM FOR RELIEF .....	11
13	IV. PLAINTIFF FAILS TO STATE A CLAIM UNDER THE BANE ACT,	
14	CIVIL CODE § 52.1 – HER FOURTH CLAIM FOR RELIEF .....	12
15	V. PLAINTIFF FAILS TO STATE FACTS A CLAIM FOR SEXUAL	
16	ASSAULT – HER SIXTH CLAIM FOR RELIEF .....	12
17	VI. PLAINTIFF FAILS TO STATE A CLAIM UNDER CAL. CIVIL.	
18	CODE § 1708.5 – HER SEVENTH CLAIM FOR RELIEF .....	13
19	VII. PLAINTIFF FAILS TO STATE A CLAIM AGAINST DR.	
20	TYNDALL FOR CONSTRUCTIVE FRAUD – HER EIGHTH	
21	CLAIM FOR RELIEF .....	14
22	VIII. PLAINTIFF FAILS TO STATE A CLAIM FOR INTENTIONAL	
23	INFLICTION OF EMOTIONAL DISTRESS – HER FOURTEENTH	
24	CLAIM FOR RELIEF .....	14
25	IX. PLAINTIFF FAILS TO STATE A CLAIM FOR UNFAIR BUSINESS	
26	PRACTICES – PLAINTIFF’S SIXTEENTH CLAIM FOR RELIEF .....	15
27	X. PLAINTIFF’S PUNITIVE DAMAGES SHOULD BE DISMISSE FOR	
28	FAILURE TO COMPLYWITH CAL. CODE OF CIVIL PROCEDURE §	
	425.13 .....	16
	XI. CONCLUSION .....	17

**TABLE OF AUTHORITIES**

<b><u>Cases:</u></b>	<b><u>Page</u></b>
<i>Aleksick v. 7-Eleven, Inc.</i> , 205 Cal.App.4th 1176 (2012) .....	15
<i>Allen v. Woodford</i> , 2006, U.S.Dist.LEXIS 45254 (E.D.Cal. 2006) .....	17
<i>Asghari v. Volkswagen Group of Am., Inc.</i> , 42 F. Supp. 3d 1306 (C.D.Cal. 2013) .....	6
<i>Bernson v. Browning-Ferris Inds.</i> , 7 Cal.4 <sup>th</sup> 926 (1994) .....	8
<i>Birdsong v. Apple, Inc.</i> , 590 F.3d 955 (9th Cir. 2009) .....	16
<i>Burrows v. Redbus Cmty Hosp. Dist.</i> , 188 F.R.D. 356 (N.D. Cal. 1997) .....	16
<i>Cel-Tech Comms., Inc. v. Los Angeles Cellular Tele. Co.</i> , 20 Cal.4th 163 (1999) .....	15
<i>City and County of San Francisco v. Ballard</i> , 136 Cal.App.4th 381 (2006) .....	12
<i>Cooper v. Superior Court</i> , 56 Cal.App.4 <sup>th</sup> 744 (1997) .....	13, 17
<i>DeRose v. Carswell</i> , 196 Cal.App.3d 1011 (1987) .....	7, 8, 13
<i>Elias v. Navasartian</i> , 2017 U.S.Dist.LEXIS 23229 (E.D.Cal. 2017) .....	16, 17
<i>Gregory v. Albertsons, Inc.</i> , 104 Cal.App.4th 845 (2002) .....	15
<i>Guerrero v. Gates</i> , 442 F.3d 697 (9 <sup>th</sup> Cir. 2006) .....	10
<i>Hughes v. Pair</i> , 46 Cal.4 <sup>th</sup> 1035 (2009) .....	7, 11, 15
<i>Jackson v. East Bay Hospital</i> , 980 F. Supp. 1341 (N.D. Cal. 1997) .....	16
<i>Leadsinger, Inc. v. BMG Music Publ'g</i> , 512 F.3d 522 (9 <sup>th</sup> Cir. 2008) .....	18

**TABLE OF AUTHORITIES (Cont.)**

1		
2		
3	<i>Lukovsky v. City and County of San Francisco,</i>	
4	535 F.3d 1044 (9th Cir. 2008) .....	9, 10
5	<i>Mark K. v. Roman Catholic Archbishop,</i>	
6	67 Cal.App.4 <sup>th</sup> 603 (1998) .....	9, 10
7	<i>Marsha v. Gardner,</i>	
8	231 Cal.App.3d 265 (1991) .....	7
9	<i>Michaelian v. State Comp. Ins. Fund,</i>	
10	50 Cal.App.4 <sup>th</sup> 1093 (1996) .....	14
11	<i>Pashley v. Pac. Elec. Ry. Co.,</i>	
12	25 Cal.2d 226 (1944) .....	8, 9
13	<i>Pillsbury, Madison &amp; Sutro v. Lerner,</i>	
14	31 F.3d 924 (9th Cir. 1994) .....	14
15	<i>Rhodes v. Placer Cnty.,</i>	
16	2011 U.S. Dist.LEXIS 35498 (E.D. Cal. 2011),	
17	adopted, 2011 U.S.Dist. LEXIS 47894 (E.D. Cal. 2011) .....	17
18	<i>Rivera v. Peri &amp; Sons Farms, Inc.,</i>	
19	735 F.3d 892 (9 <sup>th</sup> Cir. 2013) .....	6
20	<i>Scalia v. County of Kern,</i>	
21	308 F.Supp.3d 1064 (E.D.Cal. 2018) .....	16
22	<i>Shekarlab v. County of Sacramento,</i> 2018 U.S.Dist.LEXIS 70579,	
23	(E.D. Cal. 2018) .....	17
24	<i>Shoyoye v. County of Los Angeles,</i>	
25	203 Cal.App.4 <sup>th</sup> 947 (2012) .....	12
26	<i>Small v. Fritz Companies, Inc.,</i>	
27	30 Cal.4 <sup>th</sup> 167 (2003) .....	14
28	<i>Sonbergh v. MacQuarrie,</i>	
	112 Cal.App.2d 771 (1952) .....	7, 8, 13
	<i>Thomas v. Hickman,</i>	
	2006 U.S. Dist. LEXIS 72988 (E.D. Cal. 2006) .....	17
	<i>Venegas v. County of Los Angeles,</i>	
	32 Cal.4 <sup>th</sup> 820 (2004) .....	12

**TABLE OF AUTHORITIES (Cont.)**

**Statutes and Rules:**

Cal. Business & Profession Code § 17204 .....	16
Cal. Civil Code § 51.9 .....	11, 18
Cal. Civil Code § 52.1 .....	12
Cal. Civil Code § 52.4 .....	11, 18
Cal. Civil Code § 1708.5 .....	13
Cal. Code of Civil Procedure § 335.1 .....	11
Cal. Code of Civil Procedure § 340.5 .....	11
Cal. Code of Civil Procedure § 425.13 .....	16-18

**REPLY MEMORANDUM OF POINTS AND AUTHORTIES IN SUPPORT OF  
MOTION TO DISMISS FIRST AMENDED COMPLAINT**

**I.**

**PLAINTIFF’S CLAIMS ARE BARRED BY THE  
APPLICABLE STATUTES OF LIMITATIONS**

**A. Plaintiff Was Aware of Her Injuries and Their Cause Twenty-Seven  
Years Ago – The Limitations Period Accrued at that Time.**

The First Amended Complaint (“FAC”) pleads facts which demonstrate plaintiff had the requisite knowledge back *in 1991* to start the accrual of the limitations period, and where a complaint shows on its face it is barred by the applicable statute of limitations, the court may dismiss the complaint. [\*Rivera v. Peri & Sons Farms, Inc.\*, 735 F.3d 892, 902 \(9<sup>th</sup> Cir. 2013\)](#); [\*Asghari v. Volkswagen Group of Am., Inc.\*, 42 F. Supp. 3d 1306, 1323 \(C.D.Cal. 2013\)](#).

Plaintiff alleges that when she was seen by Dr. Tyndall, he engaged in an unnecessarily aggressive inspection of her private parts, felt her breasts, aggressively moved his fingers, then a speculum, inside of her. Plaintiff, *at that time*, “sensed that Dr. Tyndall’s examination was more about his own personal enjoyment than anything helpful for her.” FAC, ¶ 5. Plaintiff also alleges *at the time* she was examined by Dr. Tyndall, he made an inappropriate and demeaning remark to her when she expressed difficulty in removing her tampon. Plaintiff alleges Dr. Tyndall commented to her, “[y]ou are such an idiot – don’t you know it’s not a black hole? Haven’t you had sex before?” FAC, ¶¶ 5-6. Plaintiff has repeatedly admitted that as a result of Dr. Tyndall’s conduct she was caused “permanent and continuing injur[ies],” including “great mental, physical and nervous pain, suffering...and shock.” *Id.*, ¶¶ 68, 79, 91, 102, 116, 123, 150, 195, 202. Plaintiff was aware of her injuries and the cause of those injuries in 1991, when they allegedly occurred. It cannot therefore be disputed that plaintiff suspected (“sensed”) wrongdoing *twenty-seven years ago*.

In plaintiff’s opposition she glosses over the actual facts, hoping the court

1 accepts her conclusory assertions that she did not discover her claims until 2018.  
 2 Pltf's Opp., pp. 5:20-7:23, These assertions are contradicted by her own allegations in  
 3 the FAC: that when she read 2018 *LA Times* news article, it "brought forth a  
 4 realization that she had been betrayed and violated" by USC, and the horror and  
 5 reality of Dr. Tyndall's medical care "*set in*" and caused "*a recurrence*" of those  
 6 injuries. FAC, ¶¶ 7, 151. These allegations demonstrate Plaintiff had actual  
 7 knowledge in 1991, at the time of the purported encounter with Dr. Tyndall. Plaintiff's  
 8 assertions that the facts "set in" when she read 2018 Times article does not constitute  
 9 "later discovery" of those injuries and cause for purposes of tolling the statute of  
 10 limitations.

11 Plaintiff has not plead facts showing that she had an inability to discover her  
 12 claims at the time of Dr. Tyndall's examination, or at any time in the following 27  
 13 years, despite reasonable diligence.

14 By their very nature, the intentional tort claims plaintiff has made against Dr.  
 15 Tyndall: assault, battery, sexual harassment and intentional infliction of emotional  
 16 distress (IIED), carry with them an "awareness of harm."<sup>1</sup> As to such claims, the  
 17 discovery rule cannot apply. See [\*DeRose v. Carswell\*, 196 Cal.App.3d 1011, 1015-](#)  
 18 [\*1018 \(1987\)\*](#) (affirming the order sustaining defendant's demurrer on statute of  
 19 limitations grounds, finding delayed discovery rule did not apply to claims for assault,  
 20 battery and IIED); [\*Sonbergh v. MacQuarrie\*, 112 Cal.App.2d 771, 772-774 \(1952\)](#) (a  
 21 battery or a cause of action for negligently harming a person or a thing is complete,  
 22 and the limitations period accrues upon physical contact even though there is no  
 23 observable damage at the time of contact); [\*Marsha v. Gardner\*, 231 Cal.App.3d 265,](#)  
 24 [\*271-273 \(1991\)\*](#) (finding delayed discovery inapplicable to 32 year-old plaintiff's

25 \_\_\_\_\_  
 26 <sup>1</sup>To recover damages on an IIED claim plaintiff would have had to have been  
 27 subjected to "outrageous conduct" and, as a result, suffered "emotional distress of such  
 28 substantial quality or enduring quality that no reasonable person in civilized society  
 should be expected to endure it." [\*Hughes v. Pair\*, 46 Cal.4<sup>th</sup> 1035, 1039-1040 \(2009\)](#).  
 Knowledge of such harm and its cause would have been known to plaintiff at the time  
 of the alleged outrageous conduct giving rise thereto.



1 complaint against stepfather for sexual molestation of plaintiff that occurred when  
2 plaintiff was between the ages of 8 and 15).

3 Plaintiff's opposition ignores the holdings in *DeRose* and *Sonbergh*, which were  
4 cited in Defendant's Motion to Dismiss, P&A's, pp. 18:24-19:12.<sup>2</sup>

5 **B. Plaintiff's Reliance on the Fraudulent Concealment Theory Is Not**  
6 **Supported by the Law.**

7 Under the fraudulent concealment theory, "a defendant's fraud in concealing a  
8 cause of action against him tolls the applicable statute of limitations, but only for that  
9 period during which the claim is undiscovered by plaintiff or until such time as  
10 plaintiff, by the exercise of reasonable diligence, should have discovered it." *Bernson*  
11 *v. Browning-Ferris Inds.*, 7 Cal.4<sup>th</sup> 926, 931 (1994).

12 The case relied on by plaintiff, *Pashley v. Pac. Elec. Ry. Co.*, 25 Cal.2d 226  
13 (1944), illustrates the type of fraudulent conduct that may give rise to fraudulent  
14 concealment, which is distinguishable from the instant case. In *Pashley*, plaintiff  
15 suffered an eye injury while on a streetcar negligently operated by defendant. The  
16 defendant directed plaintiff to go to certain eye specialists who were employed by the  
17 defendant. These defendant-employed physicians examined plaintiff's eye and  
18 removed splinters of glass, told him he must not go to any other physician and that if  
19 he did, they would not be responsible. The plaintiff was also told by these physicians  
20 that his eye wounds would heal quickly, and he would have no further trouble; he was  
21 suffering mainly from shock; and that he should return in two years for a final check-  
22 up. When plaintiff followed the physicians' directions and returned in two years, he  
23 was advised by those same physicians that the cure was complete, and his eye was in  
24 perfect condition; all the while knowing his injury would eventually cause a cataract

25  
26 <sup>2</sup>Plaintiff does cite to *DeRose*, in her opposition, but only for the proposition that  
27 sexual assault constitutes outrageous conduct, *Pltf's Opp.*, P&A's, p. 14:13-19, an  
28 argument which reinforces defendant's point here, that such conduct would have put  
plaintiff on notice of the alleged wrongdoing, in addition to injury and causation, at the  
time it occurred because it was purportedly outrageous.



1 and destruction of eyesight. After plaintiff began having vision problems years later,  
 2 he consulted an independent physician and discovered that damage had been caused to  
 3 the delicate tissues of the eyeball at the time of the accident, which resulted in total  
 4 and permanent blindness in his right eye. Id., at 227-228. The Court held that because  
 5 the defendant had, through the misrepresentations to the plaintiff, prevented the  
 6 plaintiff from bringing an action within the statute of limitations period, the defendant  
 7 was estopped from relying on that defense. Id., at 231-232.

8 Mark K. v. Roman Catholic Archbishop, 67 Cal.App.4<sup>th</sup> 603 (1998) and  
 9 Lukovsky v. City and County of San Francisco, 535 F.3d 1044 (9th Cir. 2008), by  
 10 contrast, illustrate what representations will not toll the limitation period, both of  
 11 which were cited in Dr. Tyndall's motion, P&A's, pp. 19:26-20:7. The holdings in  
 12 both cases require a finding that fraudulent concealment does not apply here.  
 13 Plaintiff's opposition misrepresents the holding of the first and completely ignores the  
 14 second.

15 In Mark K., the plaintiff, while a minor, was sexually molested by a priest. He  
 16 relied on fraudulent concealment to avoid a statute of limitations defense on his  
 17 negligent supervision complaint against the church. He claimed the church had  
 18 implied that it "was safe, and morally and spiritually beneficial to all children" and  
 19 that he had not discovered, until later, that a year or two prior to his molestation the  
 20 church had received reports of the priest sexually exploiting children and was on  
 21 notice that it was foreseeable he would continue to do so. Despite these reports, the  
 22 church failed to investigate the reports and protect plaintiff from the priest. Id., 67  
 23 Cal.App.4th at 607-608. Plaintiff argued that the church owed him a fiduciary duty to  
 24 disclose the accusations against the priest and that it breached that duty by failing to  
 25 come forward with that information, which resulted in the tolling of the statute of  
 26 limitations. Id., at 613. In affirming the trial court's orders sustaining the church's  
 27 demurrer on statute of limitations grounds, the Court of Appeal rejected plaintiff's  
 28 theory. Noting that what the church failed to disclose "was merely evidence that the

wrong had been committed,” the Court held:

“If plaintiff’s approach were to prevail, then any time a tortfeasor failed to disclose evidence that would demonstrate its liability in tort, the statute of limitations would be tolled under the doctrine of concealment. Regardless of whether the issue is characterized as fraud by concealment or equitable estoppel, **this is not the law.**” Mark K., supra, 67 Cal.App.4<sup>th</sup> 613 (emphasis added).<sup>3</sup>

Lukovsky, supra, 535 F.3d 1044, a Ninth Circuit case, followed the same reasoning. The plaintiffs sought to avoid the statute of limitations in an employment discrimination action, alleging that defendants prevented them from timely filing suit by defendant’s misrepresentations about requiring written verification of qualifying experience, concealing that they were hiring unqualified Asian and Filipino applicants instead. Id., at 1051. The Ninth Circuit noted that under both California and federal law, equitable estoppel, sometimes referred to as “fraudulent concealment,” “focuses on actions taken by the defendant **to prevent** a plaintiff from filing suit.” Id., at 1051-1052

“The primary problem with plaintiffs’ argument is that their alleged basis for equitable estoppel is the same as their cause of action. As we have previously explained, the plaintiff must point to some fraudulent concealment, some active conduct by the defendant **‘above and beyond’** the wrongdoing upon which the plaintiff’s claim is filed, to prevent the plaintiff from suing in time.” Lukovsky, supra, 535 F.3d at 1052, quoting Guerrero v. Gates, 442 F.3d 697, 706 (9<sup>th</sup> Cir. 2006).

Plaintiff’s theory of fraudulent concealment against Dr. Tyndall does not rise above and beyond the alleged wrongdoing upon which her claims are based. Plaintiff’s allegation of fraud is based on Dr. Tyndall’s alleged failure to disclose to her that his conduct (i.e., the alleged inappropriate touching), was not medically proper or within the standard of care. FAC, ¶ 56; Pltf’s Opp. P&A’s, p. 9:15-18. Those allegations do not describe any further conduct above and beyond the

<sup>3</sup>Plaintiff, by her assertion that the holding in *Mark K.* was based on the finding that there was “no allegation... that the church concealed the fact of plaintiff’s underlying injury,” see Pltf’s Opp. P&A’s, p. 9:21-24, misrepresents the true holding of that case. Even if plaintiff’s representation of the holding were correct, that would not help plaintiff and neither word her reliance on *Pahsley*. Plaintiff does not allege that Dr. Tyndall concealed plaintiff’s underlying injuries or cause.

wrongdoing itself and do not demonstrate that this failure was intended to prevent plaintiff from bringing suit within the applicable statute of limitations period.

It is not disputed that several limitations periods are applicable to plaintiffs' claims, the longest of which is four years, Cal. Business & Professions Code § 17208 (applicable to plaintiff's unfair business practices claim, only). Plaintiff's lawsuit was brought 27 years after the statute of limitations accrued. Plaintiff's Complaint is *twenty-three years too-late* and is barred in its entirety.

## II.

### **PLAINTIFF HAS CONCEDED THAT HER THIRD AND FIFTH CLAIMS MAY BE DISMISSED**

Plaintiff has conceded that her Third and Fifth Claims, based on [Cal. Civil Code §§ 51.9](#) and [52.4](#) may be dismissed. Pltf's Opp., P&A's, p. 11:4-11.)

## III.

### **PLAINTIFF HAS FAILED TO STATE A CLAIM UNDER CAL. CIVIL CODE § 51– HER SECOND CLAIM FOR RELIEF**

Defendant maintains that this claim is barred by the applicable statute of limitations, whether that be the one-year limitations period applicable to claims arising out of the rendition of professional services, [Cal. Code of Civil Procedure § 340.5](#) or the two-year limitations period applicable to claims for personal injuries in general. [Cal. Code of Civil Procedure § 335.1](#).

Plaintiff's opposition clarifies that her claim under the Unruh Act is for sexual harassment, a form of sexual discrimination. Pltf's Opp. P&A's., p. 10:22-11:3.

To be actionable under both California and federal law, sexual harassment must be "pervasive or severe." See [Hughes, supra, 46 Cal.4<sup>th</sup> 1035, 1042-1046](#) (discussing sexual harassment under federal and state law).

Had plaintiff been subjected to pervasive or severe harassment by Dr. Tyndall, certainly she would have been aware of it at the time it happened and, thus, her claims would have accrued at that time. Plaintiff cannot reasonably rely on any form of

1 delayed discovery theory under these circumstances to avoid the statute of limitations  
2 bar.

#### 3 IV.

#### 4 **PLAINTIFF FAILS TO STATE A CLAIM UNDER THE BANE ACT, CIVIL** 5 **CODE § 52.1 – HER FOURTH CLAIM FOR RELIEF**

6 Plaintiff intentionally misconstrues both the Bane Act and Dr. Tyndall's  
7 argument with respect thereto. She has not addressed any of the legal authority cited  
8 by defendant in the motion to dismiss; this is because she cannot dance around it.

9 The mere fact that plaintiff has a Constitutional right to be free from sexual  
10 harassment, which she alleges she was deprived of, Pltf's Opp., p. 11:20-24, does not  
11 alone constitute a Bane Act claim.

12 Liability under [Cal. Civil Code § 52.1](#) requires an attempted or completed act of  
13 interference with a legal right, accompanied by a form of coercion. [City and County of](#)  
14 [San Francisco v. Ballard](#), 136 Cal.App.4th 381, 408 (2006); see also [Venegas v.](#)  
15 [County of Los Angeles](#), 32 Cal.4th 820, 843 (2004). Statutory or common law  
16 remedies are already available to redress interference with constitutional rights.  
17 [Section 52.1](#) focuses specifically on the *additional element of coercion*. [Shoyoye v.](#)  
18 [County of Los Angeles](#), 203 Cal.App.4th 947, 959 (2012). It is that additional  
19 element – the coercion – that plaintiff fails to allege. That failure renders plaintiff's  
20 claim under the Bane Act insufficient.

#### 21 V.

#### 22 **PLAINTIFF FAILS TO STATE A CLAIM FOR SEXUAL ASSAULT – HER** 23 **SIXTH CLAIM FOR RELIEF**

24 Accepting as true for purposes of argument plaintiff's conclusory allegation that  
25 she was placed in apprehension of harmful or offensive touching by Dr. Tyndall at the  
26 time of the examination, Dr. Tyndall's point that plaintiff cannot rely on a delayed  
27 discovery argument to avoid the statute of limitations bar is significantly reinforced.  
28 Plaintiff's allegation establishes she had knowledge of the alleged wrongdoing when it

1 purportedly happened, in addition having knowledge at that time of any injury she  
 2 purportedly suffered as a consequence, and the reason for the injury. This very same  
 3 point was recognized in the holdings in *DeRose* and *Sonberg*, that there can be no  
 4 delayed discovery when a plaintiff asserts a claim for assault, battery or intentional  
 5 infliction of emotional distress. [\*DeRose, supra\*, 196 Cal.App.3d 1011, 1018](#) and  
 6 [\*Sonbergh, supra\*, 112 Cal.App.2d 771, 772-774](#),

## 7 VI.

### 8 **PLAINTIFF FAILS TO STATE A CLAIM UNDER CAL. CIVIL. CODE §** 9 **1708.5 – HER SEVENTH CLAIM FOR RELIEF**

10 Plaintiff admits that she “consented to a gynecological exam” by Dr. Tyndall.  
 11 Pltff’s Opp. P&A’s, p. 13:5-6. Under [Cal. Civil Code § 1708.5](#) a person commits a  
 12 sexual battery when he “[a]cts with the intent to cause a harmful or offensive contact  
 13 with an intimate part of another, and a sexually offensive contact with that person  
 14 directly or indirectly results.” *Id.* “Offensive contact” means contact that offends a  
 15 reasonable sense of personal dignity. *Id.*, subd. (f). In this case, whether any touching  
 16 constituted “offensive contact” must be evaluated in the context of a gynecological  
 17 examination. By its very nature, a gynecological examination involves a touching of  
 18 the patient's "intimate parts" as described in [Section 1708.5. \*Cooper v. Superior\*](#)  
 19 [Court, 56 Cal.App.4<sup>th</sup> 744, 751 \(1997\)](#) (“[a] doctor rendering gynecological care,  
 20 cannot render the full panoply of gynecological services without touching, probing or  
 21 otherwise manipulating a woman's genitalia.”).

22 Plaintiff has not pled facts showing that Dr. Tyndall’s touching, including the  
 23 insertion of his fingers inside her vagina and anus and the insertion of a speculum,  
 24 were not proper and appropriate procedures in a gynecological examination or that Dr.  
 25 Tyndall exceeded plaintiff’s consent.

26 ///

27 ///

28 ///

VII.

**PLAINTIFF FAILS TO STATE A CLAIM AGAINST DR. TYNDALL FOR  
CONSTRUCTIVE FRAUD – HER EIGHTH CLAIM FOR RELIEF**

Defendant pointed out in his motion that it was unclear upon what basis plaintiff was asserting a claim for constructive fraud against Dr. Tyndall, as all of plaintiff's allegations of constructive fraud appear to be directed at USC. Defendant's Mot. to Dis., p. 27:14-25.

Plaintiff's opposition asserts that her claim is based on Dr. Tyndall failing to "disclose his sexually abusive proclivities and inappropriateness of his examination," Pltf's Opp. P&A's, pp. 13:21-26, citing FAC, ¶¶ 130, 138, 140, 142. These paragraphs do not clearly state that Dr. Tyndall failed to make any such disclosures. And while such allegations might arguably be inferred, constructive fraud must be pled with factual specificity. [Small v. Fritz Companies, Inc., 30 Cal.4<sup>th</sup> 167, 184 \(2003\)](#); see also [Pillsbury, Madison & Sutro, supra, 31 F.3d 924, 928](#) (describing federal pleading standards). Plaintiff has also failed to allege any facts demonstrating Dr. Tyndall had any sexually abusive proclivities about which he hid from or failed to disclose to her, or that his examination(s) were inappropriate.

VIII.

**PLAINTIFF FAILS TO STATE A CLAIM FOR INTENTIONAL INFLICTION  
OF EMOTIONAL DISTRESS – HER FOURTEENTH CLAIM FOR RELIEF**

As with the claim for sexual battery, plaintiff has not plead facts showing Dr. Tyndall's gynecological examination of plaintiff was inappropriate. She has only pled conclusory allegations, which are insufficient. [Pillsbury, Madison & Sutro, supra, 31 F.3d 924, 928](#); see also [Michaelian v. State Comp. Ins. Fund, 50 Cal.App.4<sup>th</sup> 1093, 1114 \(1996\)](#) (holding claim for intentional infliction of emotional distress must be plead with specific facts). Further, plaintiff has failed to plead facts showing Dr. Tyndall engaged in outrageous conduct, facts upon which a claim for intentional infliction of emotional distress (IIED) must be based.



Plaintiff's reliance on in support of her contentions regarding what is necessary to plead emotional distress for purposes of an IIED claim is not well founded. The California Supreme Court more recently made clear in [\*Hughes v. Pair\*, 46 Cal.4th 1035 \(2009\)](#), that to establish a claim for IIED a plaintiff must show severe emotional distress -- this means emotional distress of such substantial quality or enduring quality that no reasonable person in civilized society should be expected to endure it. [\*Id.\*, at 1051](#). Plaintiff's allegations of emotional distress (great pain of mind and body, shock, emotional distress, embarrassment, loss of self-esteem, disgrace, FAC, ¶ 202), do not show any greater degree of emotional distress which the Supreme Court found insufficient in [\*Id.\*](#) (plaintiff's "assertions that she has suffered discomfort, worry, anxiety, upset stomach, concern, and agitation as the result of defendant's [conduct] do not comprise 'emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.'").

## IX.

### **PLAINTIFF FAILS TO STATE A CLAIM FOR UNFAIR BUSINESS PRACTICES – PLAINTIFF'S SIXTEENTH CLAIM FOR RELIEF**

The Unfair Competition Law ("UCL") describes unfair competition as including "unlawful, unfair or fraudulent business practice," which, in turn, has been consistently interpreted by the courts as including anything that can be called a business practice and that at the same time is forbidden by law. [\*Cel-Tech Comms., Inc. v. Los Angeles Cellular Tele. Co.\*, 20 Cal.4th 163, 180 \(1999\)](#). Conduct which is not proscribed by any statute or regulation does not constitute unfair competition. [\*Aleksick v. 7-Eleven, Inc.\*, 205 Cal.App.4th 1176, 1192 \(2012\)](#) (an unfair competition claim, must be tethered to specific constitutional, statutory or regulatory provisions); [\*Gregory v. Albertsons, Inc.\*, 104 Cal.App.4th 845, 854 \(2002\)](#) (same).

Plaintiff states that she has asserted multiple statutory violations that may serve as a basis for her UCL claim. However, plaintiff must plead facts demonstrating a



1 claim under those statutes exists, and failing to do so, she cannot rely on those statutes  
2 for her UCL claim.

3 Further, to have standing to bring a claim under the UCL, the plaintiff *must*  
4 *show actual injury* occurred, and a loss of money or property resulted as a  
5 consequence of the unfair competition. [Cal. Business & Profession Code § 17204](#). She  
6 must show a distinct and palpable injury -- "an invasion of a legally protected interest  
7 which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or  
8 hypothetical." [Birdsong v. Apple, Inc., 590 F.3d 955, 960 \(9th Cir. 2009\)](#). Plaintiff's  
9 conclusory allegation that she suffered economic loss due to defendant's alleged  
10 wrongful conduct, FAC, ¶ 222; Pltf's Opp. P&A's p. 15:20-21, does not meet this  
11 requirement.

## 12 X.

### 13 **PLAINTIFF'S PUNITIVE DAMAGES SHOULD BE DISMISSED FOR** 14 **FAILURE TO COMPLY WITH CAL. CODE OF CIVIL PROCEDURE §** 15 **425.13**

16 Federal district courts are divided on whether [Cal. Code of Civil Procedure §](#)  
17 [425.13](#) applies in federal court. The Ninth Circuit has not resolved the issue. See  
18 [Elias v. Navasartian, 2017 U.S.Dist.LEXIS 23229, \\*16 \(E.D.Cal. 2017\)](#) ("[i]n the  
19 absence of direction from the Ninth Circuit, this court is persuaded by those of its  
20 sister courts that have found § 425.13 applicable in federal court").

21 Plaintiff asserts that the weight of authority holds that [Section 425.13](#) is a  
22 procedural statute and therefore does not apply in federal court, citing [Jackson v. East](#)  
23 [Bay Hospital, 980 F. Supp. 1341 \(N.D. Cal. 1997\)](#), [Burrows v. Redbus Cmty Hosp.](#)  
24 [Dist., 188 F.R.D. 356 \(N.D. Cal. 1997\)](#) and [Scalia v. County of Kern, 308 F.Supp.3d](#)  
25 [1064, 1091 \(E.D.Cal. 2018\)](#) and, thus, that this court should follow those decisions.

26 Defendant has found that the split of district court opinions is pretty even, with  
27 a majority of the more recent and the more persuasive decisions (as explained in  
28 defendant's moving papers) finding that a state's view of the measure of damages is

1 inseparable from the substantive right of action, such that [Section 425.13](#) must be  
 2 applied in federal court. See [Elias, supra, 2017 U.S. Dist. LEXIS 23229, \\*16](#); [Thomas](#)  
 3 [v. Hickman, 2006 U.S. Dist. LEXIS 72988, \\*41 \(E.D. Cal. 2006\)](#) (finding Section  
 4 425.13 intimately bound to the state substantive causes of action for professional  
 5 negligence); [Rhodes v. Placer Cnty., 2011 U.S. Dist. LEXIS 35498, \\*21 \(E.D. Cal.](#)  
 6 [2011\)](#), adopted, [2011 U.S. Dist. LEXIS 47894 \(E.D. Cal. 2011\)](#) (§ 425.13 is applicable  
 7 because plaintiff's punitive damages claims arise from state law claims); see also [Allen](#)  
 8 [v. Woodford, 2006 U.S. Dist. LEXIS 45254, \\*62-67 \(E.D. Cal. 2006\)](#) (“§ 425.13 is so  
 9 “intimately bound up” with the substantive law of [plaintiff’s] underlying claim that it  
 10 must be applied by federal courts when addressing the issue of punitive damages”);  
 11 [Shekarlab v. County of Sacramento, 2018 U.S. Dist. LEXIS 70579, \\*7-10 \(E.D. Cal.](#)  
 12 [2018\)](#) (finding § 425.13 to be intimately bound to state substantive law and therefore a  
 13 substantive and not a procedural rule, and there being no direct conflict between  
 14 Section 425.13 and federal rules, Section 425.13 is applicable in federal court).

15 Because plaintiff's punitive damages claim against Dr. Tyndall arises solely  
 16 from state law and is directly related to the manner in which Dr. Tyndall provided  
 17 professional services, plaintiff was required to petition the court for leave to plead  
 18 punitive damages pursuant to [Section 425.13. Cooper, supra, 56 Cal.App.4<sup>th</sup> 744, 751](#)  
 19 (“when a gynecologist is accused, ..., of committing a sexual battery in the course of  
 20 rendering gynecological services, that accusation is necessarily ‘directly related’ to the  
 21 manner in which the gynecological services were rendered,” such that Section 425.13  
 22 is applicable to a claim based thereon).

23 Because plaintiff failed to seek leave of court, as required by [Cal. Code of](#)  
 24 [Civil Procedure § 425.13](#), before pleading a claim for punitive damages, her claim for  
 25 punitive damages should be dismissed.

26 ///

27 ///

28 ///

1 **XI.**

2 **CONCLUSION**


3 Plaintiff's FAC and each claim asserted is barred by the applicable limitations  
4 periods, the longest of which is four years. On its face, the FAC shows that plaintiff  
5 was aware in 1991, twenty-seven years ago, of the purportedly inappropriate conduct  
6 at the time it occurred; that plaintiff was also aware she suffered injuries in 1991 at the  
7 time they allegedly happened – twenty-seven years ago; and that plaintiff was aware  
8 at that same time that the alleged conduct of Dr. Tyndall was the cause of those  
9 injuries. Based on the allegations contained in plaintiff's complaint, plaintiff further  
10 *suspected* the conduct was wrongful at that time, and her claims for assault and  
11 intentional infliction of emotional distress also reflect she was actually aware that the  
12 alleged conduct was purportedly wrongful twenty-seven years ago.

13 Plaintiff has conceded that her Third (based on [Cal. Civil Code § 51.9](#)) and  
14 Fourth (based on [Cal. Civil Code § 52.4](#)) Claims for Relief may be dismissed.  
15 Plaintiff has failed to state facts upon which relief may be granted on her other claims  
16 and she has asserted a claim for punitive damages without complying with [Cal. Code](#)  
17 [of Civil Procedure § 425.13](#), as required. For those reasons, those claims should be  
18 dismissed.

19 Because plaintiff cannot conceivably amend her complaint to avoid the statute  
20 of limitations bar, the Court may and should properly deny leave to amend.  
21 [Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 532 \(9<sup>th</sup> Cir. 2008\)](#) (court may  
22 deny leave to amend where amendment would be futile).

23 DATED: March 25, 2019

TAYLOR DEMARCO LLP

24  
25 By:   
26 N. DENISE TAYLOR  
27 CHERIE L. LIEURANCE  
28 Attorneys for Defendant,  
GEORGE TYNDALL, M.D.

**CERTIFICATE OF SERVICE**

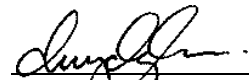
I, Christine Chung, hereby certify that on this 25<sup>th</sup> day of March 2019, I electronically filed the following documents:

**REPLY MEMORANDUM OF POINTS AND AUTHORTIES IN SUPPORT OF  
MOTION OF DEFENDANT GEORGE TYNDALL, M.D. TO DISMISS  
PLAINTIFF'S FIRST AMENDED COMPLAINT**

with the Clerk of the United States District Court for the Central District of California using the CM/ECF system which shall send electronic notification to all counsel of record. See attached Notice of Electronic Service for all parties served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Los Angeles, California on March 25, 2019.

  
Christine Chung

**SERVICE LIST**

Re: Jane Doe v. USC, et al.  
Case No: 2:18-cv-09530-SVW-GJS

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